

A **Soh Keng Hian v American International Assurance
 Co Ltd**

COURT OF APPEAL (KUALA LUMPUR) CIVIL APPEAL NO J-02-201-
1994

B GOPAL SRI RAM, SITI NORMA YAAKOB, MAHADEV SHANKAR JJCA
16 JANUARY 1995

*Civil Procedure — Appeal — Application to extend time to serve notice of appeal —
Notice of appeal filed but not served on opposing party — Time for serving notice expired —
Discretion of Court of Appeal to grant extension — General principle — Rules of the
Court of Appeal 1994*

C *Civil Procedure — Appeal — Want of prosecution — Striking out for want of
prosecution — Notice of appeal filed but not served — Time for serving notice expired —
Delay in the application for extension of time to serve notice of appeal — Whether could
apply to strike out appeal for want of prosecution*

D On 3 September 1994, the High Court at Muar delivered its decision
in the suit between the appellant and the respondent. Dissatisfied
with the decision, the appellant filed an appeal in the Registry of the
High Court on 1 October 1994. The last date for serving the notice
of appeal on the respondent was 4 October 1994. However, the
E appellant overlooked serving it. On 10 October 1995, the respondent
became aware of the appellant's intention to appeal, when it received
a copy of a letter from the appellant's solicitors addressed to the
deputy registrar of the High Court enclosing the copies of the notice
of appeal for filing. On 13 December 1994, the respondent filed a
motion to strike out the appeal for want of service of the notice of
F appeal on it ('the respondent's application'). On 13 January 1995,
the appellant put in his application for extension of time to serve the
notice of appeal on the respondent ('the appellant's application').
Thus, in this case, the Court of Appeal had to consider whether or
not to allow: (i) the appellant's application; and (ii) the respondent's
G application.

Held, refusing the appellant's application and allowing that of the
respondent:

- H (1) An appeal is brought to this court by filing and serving the notice
of appeal. The one act without the other renders the appeal
incompetent (see p 194G); *Gurbachan Singh v Seagrott & Campbell*
(No 2) [1962] MLJ 370 followed.
- I (2) It is axiomatic that this court is seized of a wide discretion to
extend time in proper and deserving cases. But, it is not an
unprincipled discretion. There must be some relevant evidential
material made available before the court may exercise discretion
(see p 194H).

- (3) In the present case, there was no reasonable explanation for the failure to serve and the delay in approaching this court. Having taken into account all that could be said in favour of the appellant, and weighing it against all the other circumstances of the case, and also, having considered all the relevant circumstances, the court found that it was unable to exercise discretion in the appellant's favour (see p 195B). A B

Per curiam:

Pursuant to the Federal Court (Civil Appeals) (Transitional) Rules 1963, an appellant is required to obtain special leave to extend time to either file or to serve a notice of appeal. However, there is no such requirement under the Rules of the Court of Appeal 1994 (see p 194I). C

[Bahasa Malaysia summary]

Pada 3 September 1994, Mahkamah Tinggi di Muar telah menyampaikan keputusannya dalam guaman antara perayu dengan penentang. Perayu tidak berpuas hati dengan keputusan itu lalu memfailkan suatu rayuan di pejabat Pendaftaran Mahkamah Tinggi pada 1 Oktober 1994. Tarikh terakhir untuk menyampaikan notis rayuan pada penentang ialah 4 Oktober 1994. Walau bagaimanapun, penyampaian notis tersebut terlepas perhatian perayu. Pada 10 Oktober 1995, penentang sedar tentang niat perayu untuk membuat rayuan, apabila ia menerima sesalinan surat dari peguamcara perayu yang dialamatkan kepada timbalan pendaftar Mahkamah Tinggi, di mana salinan notis rayuan untuk pemfailan telah dilampirkan. Pada 13 Disember 1994, penentang telah memfailkan suatu usul untuk membatalkan rayuan kerana ketiadaan penyampaian notis rayuan ke atasnya ('permohonan penentang'). Pada 13 Januari 1995, perayu memasukkan permohonannya untuk perlanjutan masa bagi menyampaikan notis rayuan pada penentang ('permohonan perayu'). Maka, dalam kes ini, Mahkamah Rayuan harus mempertimbangkan sama ada atau tidak untuk membenarkan: (i) permohonan perayu; dan (ii) permohonan penentang. D E F G

Diputuskan, menolak permohonan perayu dan membenarkan permohonan penentang:

- (1) Sesuatu rayuan harus dibawa ke mahkamah ini secara memfailkan dan menyampaikan notis rayuan. Satu tindakan tanpa yang satu lagi akan menyebabkan sesuatu rayuan itu tidak kompeten (lihat ms 194G); *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370 diikuti. H
- (2) Adalah tidak boleh disangkal bahawa mahkamah ini mempunyai budi bicara yang luas untuk melanjutkan masa dalam kes yang wajar dan patut. Walau bagaimanapun, ini bukan merupakan suatu budi bicara yang tidak berlandaskan prinsip. Material I

- A keterangan yang relevan harus dikemukakan sebelum mahkamah boleh menggunakan budi bicara tersebut (lihat ms 194H).
- (3) Dalam kes ini, tidak terdapat penjelasan yang munasabah terhadap kegagalan untuk menyampaikan notis dan kelewatan dalam mengemukakan permohonan di mahkamah ini. Selepas mengambil kira kesemua perkara yang memihak kepada perayu, dan selepas mempertimbangkannya bersama dengan kesemua keadaan kes, dan juga selepas mengambil kira kesemua keadaan yang relevan, mahkamah ini mendapati bahawa ia tidak boleh menggunakan budi bicaranya untuk membuat keputusan yang memihak kepada perayu (lihat ms 195B).
- B
- C

Per curiam:

- Menurut Kaedah-Kaedah Mahkamah Persekutuan (Rayuan Sivil) (Peralihan) 1963, seseorang perayu perlu mendapatkan kebenaran khas untuk melanjutkan masa untuk sama ada memfailkan atau untuk menyampaikan notis rayuan. Walau bagaimanapun, tidak terdapat keperluan sedemikian di bawah Kaedah-Kaedah Mahkamah Rayuan 1994 (lihat ms 184I).]
- D

Notes

- E For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

- Coles & Ravenshear, Re* (1907) 1 KB 1
- Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370
- Setali Development Sdn Bhd v Lim You Keng* [1984] 1 MLJ 26
- Sinnathamby & Anor v Lee Chooi Ying* [1987] 1 MLJ 110
- F

Legislation referred to

- Federal Court (Civil Appeals) (Transitional) Rules 1963
- Rules of the Court of Appeal 1994
- G

Appeal from: Civil Suit No 23–47–1988 (High Court, Muar)

- Lim Huck Beng (HB Lim, Farha & Lim)* for the appellant.
- Robert Lai (Jackson & Masacorale)* for the respondent.
- H

Cur Adv Vult

- Gopal Sri Ram JCA** (delivering the judgment of the court): There are two motions in this appeal. The first is an application, dated 13 December 1994, by the respondent to strike out the appeal for want of service of the notice of appeal on it; the second is dated 13 January 1995, and was taken out by the appellant for extension of time to serve the notice of appeal on the respondent.
- I

The relevant chronology is not in dispute. The High Court at Muar delivered its decision in the suit between the parties on 3 September 1994. The appellant was dissatisfied with the decision. He wished to challenge the decision of the High Court. So, on 1 October 1994, he filed an appeal in the Registry of the High Court. That was within the time limited by the Rules of the Court of Appeal 1994. But, he overlooked serving it on the respondent. The last date for doing this was 4 October 1994, and not 3 October 1994, as contended by the respondent in its affidavit. See *Setali Development Sdn Bhd v Lim You Keng* [1984] 1 MLJ 26. A B

On 10 October 1995, the respondent received a copy of a letter from the appellant's solicitors addressed to the deputy registrar of the High Court at Muar enclosing the requisite number of copies of the notice of appeal for filing. This was the first time the respondent became aware of the appellant's intention to appeal. The respondent's solicitors waited for more than two months to be served with the notice of appeal. They were not. On 13 December 1994, they filed a motion to strike out the appeal. Even this did not stir the appellant into any form of activity. He continued to do nothing for another month. It was only on 13 January 1995, that is to say, some three days before the respondent's motion was scheduled to be heard, that the appellant put in his application to have time extended for service of the notice of appeal. C D

The appellant's reasons for not serving the notice of appeal on the respondent within time are wholly unconvincing. He says that there was some confusion resulting from the transfer of the judge from Muar to Kuala Lumpur. We are quite unable to see what all this has to do with the duty of the appellant to serve the notice of appeal on the respondent. Further, there is not a word in the appellant's affidavit explaining the delay in filing its application for an extension of time. Surely, there was nothing in the way of the appellant making such an application timeously to this court. As matters stand, the application was not filed until a month after the respondent had taken steps to have the appeal dismissed. E F

We do not intend to dwell upon the rules of court. This much is clear. An appeal is brought to this court by filing *and* serving the notice of appeal. The one act without the other renders the appeal incompetent. There are scores of authorities on the point commencing from *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370. G

It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But it is not an unprincipled discretion. There must be some relevant evidential material made available to us before we may exercise discretion. H

Further, we are fully conscious of the difference between the language of the Federal Court (Civil Appeals) (Transitional) Rules 1963 and the Rules of the Court of Appeal 1994. The former required an appellant to obtain special leave to extend time to either file or to serve a notice of appeal. The latter has no such requirement. This difference in language has an important consequence. Whereas in an application under the former, the mistake of a solicitor or his clerk was no excuse (*Re Coles &* I

A *Ravenshear* (1907) 1 KB 1), it is a factor which the court may now take into account when deciding whether to grant an extension of time under the latter (*Sinnathamby & Anor v Lee Chooi Ying* [1987] 1 MLJ 110).

B In the present case, there was, as we have earlier observed, no reasonable explanation for the failure to serve and the delay in approaching this court. We took into account all that could be said in favour of the appellant, and weighed it against all the other circumstances of the case. Having done this, and having considered all the relevant circumstances, we found ourselves unable to exercise discretion in the appellant's favour.

C In the exercise of our discretion, we refused the appellant's application and granted that of the respondent. Costs of both applications were awarded to the respondent. Consequently, the appeal was dismissed with costs, and the deposit was ordered to be paid to the respondent to account of its taxed costs.

Order accordingly.

D

Reported by Isabel Liong

E

F

G

H

I